FILED BY CLERK
NOV 18 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICARDO PERALTA VOLTARES, Appellant.	)	2 CA-CR 2011-0031 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101945001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
Attorneys for Appellee

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V Á S Q U E Z, Presiding Judge.

¶1 Ricardo Voltares appeals from his conviction for aggravated driving with an illegal drug or its metabolite in his body. He argues the trial court erred in denying his

motion to dismiss based on lack of probable cause for his arrest and in denying his requested jury instructions on "voluntary act" and "conscious awareness." We affirm.

¶2 We view the evidence in the light most favorable to sustaining the court's ruling, *State v. Canales*, 222 Ariz. 493, ¶ 5, 217 P.3d 836, 837 (App. 2009), but review de novo whether that evidence supported the court's determination of probable cause, *State ex rel. McDougall v. Superior Court*, 191 Ariz. 182, 186, 953 P.2d 926, 930 (App. 1997). In May 2009, Pima County Sheriff's Department sergeant Manoleas stopped Voltares for speeding. Voltares had been driving seventy-two miles-per-hour, thirty-two miles-per-hour above the posted speed limit. During the stop, Manoleas noted that Voltares's breath smelled of intoxicants, his eyes were bloodshot, his speech was slurred, and he was swaying. Voltares denied having consumed any alcohol. Manoleas attempted to administer the horizontal gaze nystagmus (HGN) field sobriety test, but Voltares stopped the test before its completion. Manoleas testified that Voltares exhibited two intoxication cues before he stopped the test. Voltares refused further field sobriety tests, but did perform a preliminary breath test (PBT) which showed a blood alcohol concentration (BAC) of .051. Only after the PBT did Voltares admit he had been drinking. Manoleas then arrested Voltares for driving under the influence of an intoxicant (DUI). Analysis of Voltares's blood showed his BAC to be .072 and the presence of carboxyl tetrahydrocannabinol (THC), a marijuana metabolite.

¶3 Voltares was charged with aggravated DUI and aggravated driving with an illegal drug or its metabolite based on Voltares's two previous DUI convictions. Before trial, Voltares moved to dismiss the indictment, arguing Manoleas lacked probable cause

to arrest him. The parties agreed the motion to dismiss would "be heard during the trial proceedings." On the third day of trial, the court denied Voltares's motion. The jury acquitted Voltares of aggravated DUI but found him guilty of aggravated driving with an illegal drug or its metabolite in his system. The court suspended the imposition of sentence and placed Voltares on four years' probation, the conditions of which included a four-month term of incarceration.

¶4 Voltares first argues Manoleas lacked sufficient probable cause to arrest him for DUI, contending there was no evidence he was impaired. A peace officer may make an arrest without a warrant if he or she has probable cause to believe that a crime has been committed and that the person to be arrested committed the offense. *See* A.R.S. § 13-3883(A). "'Probable cause is something less than the proof needed to convict and something more than suspicions.'" *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005), *quoting State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989). "Only the probability and not a prima facie showing of criminal activity is the standard of probable cause." *State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987). "When assessing whether probable cause exists, 'we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id., quoting Brinegar v. United States*, 338 U.S. 160, 175 (1949). Here, in order to arrest Voltares for DUI, Manoleas had to have reason to conclude it was probable that Voltares was "impaired to the slightest degree" due to the influence of "intoxicating liquor, any drug, a vapor

releasing substance containing a toxic substance, or any combination [thereof]." A.R.S. § 28-1381(A)(1).

¶5 Voltares contends there was no evidence he was impaired, asserting that his bloodshot eyes, odor of intoxicants, slurred speech, and sway "were not sufficient to provide probable cause to arrest" and showed only that he may have consumed alcohol, not that he was impaired.[1] But Manoleas testified that Voltares had a "two to three-inch circular sway" and that the sway was "more [pronounced] than a normal person would have" and was an indicator of impairment. Slurred speech also indicates impairment. *See State v. Rosengren*, 199 Ariz. 112, ¶ 3, 14 P.3d 303, 306 (App. 2000). These facts clearly suggest Voltares was impaired to the slightest degree and were sufficient to establish probable cause for arrest. We reject Voltares's suggestion that probable cause was lacking because he "control[led] . . . his vehicle . . . without fault, . . . had no trouble producing his paperwork, [and] was polite and respectful and behaved appropriately throughout the investigation." Although these facts arguably mitigate against a finding of probable cause, they do not outweigh Voltares's obvious symptoms of intoxication.[2]

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[1]In support of this argument, Voltares relies on *State v. Buccini*, 167 Ariz. 550, 810 P.2d 178 (1991). Voltares does not explain the relevance of *Buccini*, which did not discuss a DUI investigation or probable cause to arrest but instead probable cause to obtain a search warrant in entirely distinguishable circumstances. *Id.* at 557-58, 810 P.2d at 185-86. And, although *Buccini* states we should "resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment," *id.* at 558, 810 P.2d at 186, and despite the trial court's characterization of the issue as being "close," we find nothing "marginal" about the probable cause present here.

[2]Voltares also asserts the evidence showed his excessive speed did not indicate impairment and, in any event, the trial court "found no evidence of impairment based on

¶6 Voltares additionally contends the PBT test result of .051 and the two cues he exhibited on the HGN test were insufficient to indicate impairment and he suggests those tests implied he had not been impaired. We disagree. Although Manoleas testified the interrupted HGN test was "inconclusive," he also testified the two cues in the abbreviated test suggested to him that Voltares had been impaired. Regarding the PBT, Voltares is correct that § 28-1381(G) provides that, "[i]n a [DUI] trial, action or proceeding," an AC greater than .05 but less than .08 does not create a presumption of intoxication and an AC of .05 or less creates a presumption that a person is not "under the influence of intoxicating liquor." Assuming, without deciding, that the presumptions listed in § 28-1381(G) are relevant to a probable cause determination, Manoleas testified he found the PBT result questionable because Voltares would not or could not provide enough breath for a sufficient sample, and Manoleas was forced to "manual[ly] capture" a sample that was "much smaller" than normal. Manoleas also noted that Voltares "wasn't acting like someone who was at a BAC of . . . .05. He was showing me more impairment." For these reasons, the trial court did not abuse its discretion in denying Voltares's motion to dismiss.

¶7 Voltares next argues the trial court erred in denying his request for jury instructions on "voluntary act" and "conscious awareness" that were consistent with his theory of the case that he had involuntarily and unknowingly inhaled marijuana smoke.

Voltares's driving." Whether the court considered Voltares's driving as a basis for probable cause is not entirely clear, but Manoleas acknowledged speeding is not an indicator of intoxication. In any event, even disregarding Voltares's speeding, there was ample evidence supporting a finding of probable cause.

During trial, a criminalist testified that the concentration of carboxyl THC found in Voltares's blood was "a small amount." When Voltares's counsel asked whether the criminalist could "rule out the possibility that Mr. Voltares got this in his system simply from being in a room where there was marijuana being smoked," the criminalist responded that it was "fairly reasonable you could rule it out." He also described a study that suggested that only under the most extreme conditions could passive exposure to marijuana smoke reach the concentration found in Voltares's blood. Although he acknowledged it was "possib[le]" the amount of metabolite found in Voltares's blood could result from passive exposure, he declined to characterize it as a "real possibility."

¶8 Based on that testimony, Voltares requested two jury instructions. The first provided that the state had to prove beyond a reasonable doubt that Voltares had voluntarily ingested marijuana and defined the term "voluntary act" pursuant to A.R.S. § 13-105(42). *See* A.R.S. § 13-201 (criminal liability requires "voluntary act or the omission to perform a duty imposed by law"). The second provided the state had to prove beyond a reasonable doubt that Voltares "had conscious awareness of driving a motor vehicle after voluntarily ingesting marijuana that would cause him to continue to have marijuana metabolite in his system." The trial court denied the request, noting "it is a strict liability situation" and that passive inhalation of marijuana smoke would be a voluntary act. We review the refusal to give a proposed instruction for an abuse of discretion. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). A party is entitled to an instruction on any theory of the case that is reasonably supported by the evidence. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶9 Voltares asserts the trial court erred in rejecting his requested instructions because breathing is not a voluntary act as defined by § 13-105(42) and he may not have been aware he had breathed marijuana smoke. We need not reach these arguments, however, because the premise for Voltares's proposed instructions—that he involuntarily inhaled marijuana smoke resulting in the presence of carboxyl THC in his blood—is not supported by the evidence.[3] No reasonable jury could conclude from the criminalist's testimony that the concentration of metabolite in Voltares's blood resulted from passively inhaling marijuana smoke. Although the criminalist admitted it was possible, his testimony makes clear it was not reasonably likely.

¶10 For the reasons stated, we affirm Voltares's conviction and sentence.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[3]To the extent it is separable from his argument regarding the jury instructions, we also need not reach Voltares's argument that his conviction violated due process because he may have unknowingly inhaled marijuana smoke.